

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2096

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO: 77-2096

* PLEASE RETURN TO *
* RECORDS ROOM *

LEE KOO,

Petitioner/Appellant

-VS-

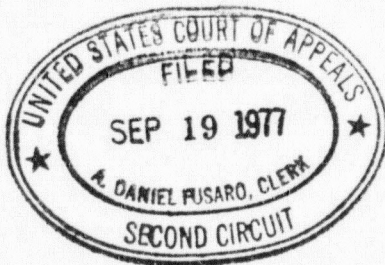
UNITED STATES OF AMERICA,

Respondent/Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK D.C. CIVIL
NUMBER 77 CIVIL 926. F. V. BRYAN, DISTRICT JUDGE

BRIEF OF THE APPELLANT

⁺
Appendix



Lee Koo, Appellant Pro Se
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P/s

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO: 77-2096

LEE KOO,

Petitioner/Appellant,

v.

UNITED STATES OF AMERICA,

Respondent/Appellee

BRIEF OF THE APPELLANT

JURISDICTION

This Court has jurisdiction to entertain this appeal submitted in forma pauperis, pursuant to Title 28 United States Code Section 1915, and Rule 24, Federal Rules of Appellate Procedure, from a denial of a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255.

The final ORDER appealed from was entered on May 9, 1977 by the Honorable Frederick Van Pelt Bryan, D.J., and attached hereto as (APPENDIX I (Page I-1 and I-2)).

STATEMENT OF THE CASE
=====

The Appellant was convicted on an Indictment No. 72 CR 1325, out of the Southern District of New York, in a non-jury trial before the Honorable Frederick Van Pelt Bryan, United States District Judge of (1) Conspiracy to import narcotics in violation of 21 U.S.C. § 846 and 963; and (2) Possession with intent to distribute the narcotics in violation of 21 U.S.C. § 812 and 841.

The Appellant was adjudged guilty of the conspiracy charge and the Court reserved decision on the substantive count and thereafter found the appellant guilty of Attempt to commit the substantive count, as reported in United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y.), and the conviction was affirmed by this Court in 484 F.2d 1271 (2nd Cir. 1973), and certiorari was denied as reported in 415 U.S. 978 (1974).

The Court imposed a sentence of 15 years on each count with a special parole term of 3 years to follow, with the sentences imposed consecutive to each other for a total of 30 years.

On June 26, 1974, a Rule 35, Federal Rules of Criminal Procedure Motion was granted and the Court modified the Sentence under the parole provisions of 18 U.S.C. § 4208(a)(2).

STATEMENT OF FACTS

Appellant has been in custody since November 21, 1972, with the instant sentence imposed on March 26, 1973. In December, 1974, the Appellant appeared before the Parole Board for his initial parole review hearing, and parole was denied and a review hearing was scheduled for March, 1976. A review of the actions taken by the Parole Board at subsequent hearings may be found in (APPENDIX II (Pages II-1 & II-2)).

Appellant's codefendant Heng Roman was paroled in April, 1976, and the Appellant is next scheduled for a review hearing in January, 1978.

The instant appeal arises from a Motion to Vacate Sentence filed pursuant to 28 U.S.C. § 2255, collaterally attacking the sentence imposed on the basis that the Parole Board controverted the specific intent of the Court when the Court modified the sentence pursuant to 18 U.S.C. § 4208(a)(2). The Government filed a Motion to Dismiss on the basis that the Court below lacked jurisdiction to entertain a motion pursuant to 28 U.S.C. § 2255 wherein the abuse of discretion of the Parole Board was challenged, and could only be raised in a Motion in the Court where the Appellant was incarcerated. The Court below granted the Government's Motion (Appendix I), and this appeal was taken.

This Appeal brings a critical issue before this Court that must be viewed with tolerance and understanding because the Government, with its abundant resources, has successfully misstated the issues with an

impressive showing of case law supporting their misinterpretation of the issues, thereby, effectively depriving the Appellant his right to due process of law, and to have the issues heard in the Sentencing Court as authorized under the statute 28 U.S.C. § 2255.

ISSUE PRESENTED FOR REVIEW
=====

- I. THE DISTRICT COURT ERRED IN GRANTING THE GOVERNMENT'S
MOTION TO DISMISS ON THE BASIS THAT THE COURT LACKED
JURISDICTION UNDER 28 U.S.C. § 2255.

ARGUMENT IN SUPPORT OF ISSUE
=====

Title 28 United States Code Section 2255 was enacted by Congress to alleviate the over-burdened District Courts that are located within the jurisdiction of a Federal Penitentiary and to save the time and expense of transporting trial records from the Sentencing District, and yet not deprive a federal prisoner of his rights to relief of Habeas Corpus.

The purpose of 28 U.S.C. § 2255, was defined in Walters v. United States, (U.S.D.C., N.Y. 1975), 404 F. Supp. 996, as:

One of the purposes of this section providing for Motion to Vacate or correct sentence was to permit trial judge because of his familiarity with original proceedings and ability to supplement record to hear motions collaterally attacking the sentences.

In DiAngelo v. United States (U.S.D.C. PA 1976), 406 F. Supp.

880:

This section with respect to Motion to Vacate Convictions and sentence confers as broad a power as common law habeas corpus, and district court thereunder has full authority to examine the lawfulness of any conviction or sentence entered in that Court.

Finally a case directly on point with the case at bar; United States v. Silverman, (D.C.N.J. 1975), 406 F. Supp. 862:

District Court had jurisdiction to determine whether sentencing judge's expectations about defendant's parole possibilities were frustrated, and, if so, whether the frustration of the expectations constituted illegally under federal rule, or whether the defendant had suffered a deprivation of federal rights so as to confer upon the district court jurisdiction under statute, to correct or set aside defendant's sentence.

The case at bar presents circumstances that are not typically present in the usual cases presented to a court.

- (1) The Appellant is a foreign national.
- (2) Sentences were imposed both for the offense of "conspiracy" and "attempt".
- (3) Judgment on the attempt charge was reserved by the trial judge to determine whether the Indictment and evidence proved that the Defendant violated the Controlled substance act twice or whether the illegal acts constituted a single course of criminal conduct.

- (4) The trial court determined that the defendant violated the act twice and thereafter imposed consecutive sentences.
- (5) The record in United States v. Heng Awkak Roman, 356 F. Supp. 434, disclosed and specifically noted that Appellant's participation in the offense was peripheral at best with co-defendant Heng Awkak Roman shown to be the prime offender.
- (6) Sentence was imposed without benefit of pre-sentence report, or without the Appellant being permitted to refute the unsupported statement of agent stating appellant was involved in foreign country with a large narcotic distribution ring.
- (7) CO-defendant Heng Awkak Roman was released on parole in April, 1976, Appellant still continues serving sentence.
- (8) In the Court's ORDER granting the Government's Motion to Dismiss (APPENDIX I) the Court expresses his sentencing intent by stating his difficulty in understanding why Appellant was not paroled.

The above noted facts can only be gleaned from a review of the records and files of the case located in the Sentencing Court.

The Motion to Vacate Sentence was not submitted as an attack on the authority of the Parole Board to Grant or Deny Parole, it was a Petition to the Sentencing Court to clarify its intent, when two years after the sentence had commenced to be served, the Court modified the provisions under 18 U.S.C. § 4208(a)(2). The imposition, and subsequent modification was made by the Sentencing Court; the Judgment

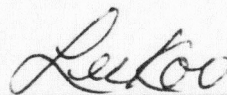
of Commitment did not stipulate that the Court intended that the Appellant serve more of the sentence than his co-defendant; therefore, judicial clarification to prevent a flagrant denial of due process must be made by the Sentencing Court since the Sentence Court imposed sentence without a pre-sentence report, prejudicial denial of parole to Appellant effectively imposed a greater sentence of Appellant than his co-defendant, and only the Sentencing Court has the jurisdiction to imposed penalty on Appellant contrary to his sentencing intent.

Appellant states that a habeas corpus attack in any court besides the Sentencing Court would require testimony by the Sentencing Judge as to the basis of the sentence imposed since no pre-sentence report was prepared.

CONCLUSION AND PRAYER
=====

The Appellant prays the Court consider the Motion, the Records and the Files of the Case; the Court's lack of requesting a pre-sentence report, the attached appendix, and the fact that the Appellant's co-defendant has been released on parole, and after such consideration to remand to the Court below for an Evidentiary Hearing on the basis of the law and the facts.

Respectfully submitted,



Lee Koo, Appellant Pro Se

September 13, 1977

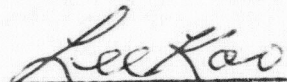
CERTIFICATE OF SERVICE BY MAIL

I, HEREBY CERTIFY, that I am the Appellant in the foregoing
Brief of the Appellant, and that I have served a copy of said brief,
and appendix on the office of the UNITED STATES ATTORNEY for the
Southern District of New York, U. S. Courthouse, Eoley Square,
New York, New York, 10007 by sending it in the United States Mails
by CERTIFIED MAIL-RETURN RECEIPT REQUESTED this 13th day of September
1977.

STATE OF GEORGIA)

:ss

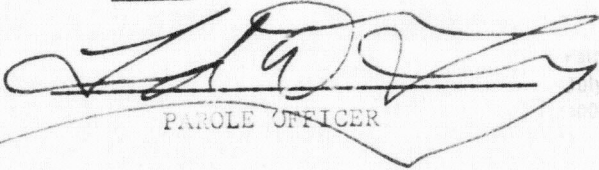
COUNTY OF FULTON)



Lee Koo, Appellant

SUBSCRIBED BEFORE ME AND SWORN TO

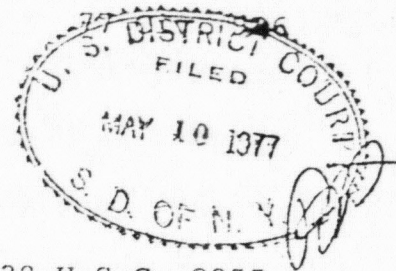
THIS ____ DAY OF SEPTEMBER, 1977.



PAROLE OFFICER

Lee Koo v. United States

E N D O R S E M E N T



In this proceeding pursuant to 28 U.S.C. 2255, petitioner, sentenced by me under then 18 U.S.C. §4208(a)(2), attacks the refusal of the United States Board of Parole to release him on parole for deportation to Malaysia on the ground tht such refusal was arbitrary and unreasonable. It is plain that this court is without jurisdiction to pass on the merits of petitioner's application under §2255. See United States v. Huss, 540 F.2d 598, 603-604 (2d Cir. 1975); Billiteri v. United States Board of Parole, 541 F.2d 938 (2d Cir. 1976); United States v. Di Russo, 535 F.2d 673 (1st Cir. 1976); Zannino v. Arnold, 531 F.2d 687, 689 n. 5 (3d Cir. 1976).

While on the record of the parole proceedings submitted to me by the government I find it difficult to understand why the petitioner has been denied parole to deportation, I do not pass on the merits of the petitioner's contentions. I must grant the government's motion to dismiss the petition for want of jurisdiction and hereby do so.

Petitioner's claims must be raised by an application for a writ of habeas corpus pursuant to 28 U.S.C. §2241, filed in the United States District Court for the Northern District of Georgia, the district in which he is currently

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Appendix I

I-1

confined and his custodian is located. Billiteri
v. United States Board of Parole, supra, at 948;
United States v. Di Russo, supra, 675-76.

IT IS SO ORDERED.

Frederick M. Bryan
Senior United States District Judge

Dated: New York, New York
May 9, 1977

KOO, Lee

Register Number 77109-158

INSTITUTION: ATLANTA

DATE NOTICE SENT: OCTOBER 14, 1976

=====

SUPPLEMENT TO BP FORM I-22

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My case was opened pursuant to CFR 2.15 in October, 1976 on an Institution Referral for Early Review. The decision was "No Change in Order dated March 23, 1976. (Continue for IRH in 1/78).

MARCH 23, 1976 Decision:

"continue for Institutional Review Hearing in January 1978."

REASONS: Because of your affiliation with a big international drug syndicate which operated from Malaysia, as indicated in 484 Federal Reporter, 2d, 1271, and because of your characterization as a full partner in the drug transaction, and because you were identified as the drug supplier's right hand man, as stated in 356 Federal Supplement 434, there is not a reasonable probability that you will remain at liberty without violating the law.

DECEMBER 23, 1974 Decision:

"Continue for Institutional Review Hearing in March 1976."

REASONS: Your offense behavior has been rated as very high severity. You have been in custody a total of 25 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted because your release at this time would depreciate the seriousness of the offense committed and thus is incompatible with the welfare of society.

Initially at the Parole Interview at Lewisburg, the Parole Examiners suggested parole, a Parole date effective February 10, 1975. At the same time HENG ROMAN received the same set off. ROMAN is referred to above as the applicant's co-defendant. Washington revised the parole decision as noted above in order to place the applicant into the suggested guidelines. HENG ROMAN remained at Lewisburg, while the applicant was transferred to Springfield for medical reasons, then to United States Penitentiary, Atlanta. HENG ROMAN was paroled effective April 1976 and is now at home in Singapore. The applicant was set-off until January, 1978.

Appendix II

II-1

The classification committee at U.S.P. Lewisburg comprised of 3 members (2 of the three recommended parole). The two parole interviewers at Lewisburg recommended parole. The classification committee at this institution composed of 3 members recommended ~~parole~~ parole, as well as Mr. Hogan, Warden; making a total of 8 professionally trained Employees and/or Agents of the Parole Commission that have determined from their trained professional opinion the applicant should be granted parole.

The applicant has no prior criminal record; an unblemished prison record; and a medical condition that supports the necessity of early release. The applicant has close family ties in Singapore and a 30-year work record. His involvement was peripherally in that he merely accompanied HENG ROMAN to New York. Quoting from the same record used in the March 23, 1976 decision; it was shown that HENG ROMAN was the principal movant; in fact, two government agents and 1 government witness testified under oath that they never spoke to or heard KOO'S name mentioned in this offense, either in Singapore or anywhere else. All negotiations were handled by HENG ROMAN, as adduced at the trial.

KOO has 5 children who are being partly supported by his brother who has 9 children of his own. The applicant has both a job and a home waiting from him in Singapore. Since the Court did not make a presentence report on the applicant it is difficult to substantiate the truth of these allegations, however, the authorities in Singapore will verify that KOO'S criminal record in Singapore (or anywhere) is devoid of any entries, and his neighbors and employers in Singapore will support the fact that KOO has worked all of his adult life mostly 8 to 12 hours a day.

It is difficult to counteract a decision by this Commission under the circumstances of the applicant's co-defendant, and principal mover in the offense receiving parole. HENG ROMAN is a single man, with no family ties; he could speak the English language; he was the prime mover in the offense as noted at the trial; both have the same sentence, with an 18 U.S.C. § 4208(a)(2) sentence; yet KOO remains incarcerated and ROMAN is on parole.

The sentence imposed consecutively for a conspiracy and an attempt, for the same offense is found to be erroneous in other Circuits except the Circuit where KOO was sentenced.

The disparity between co-defendants in the instant decision is totally inconsistent, making the decision to deny parole incompatible with the facts in the case; the records of the applicant; and the background when compared with that of the co-defendant who is released on parole.